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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

JEREMY AND KIMBERLY HARRIS, Plaintiffs/Cross-Petitioners v. RICHARD E. GORDON, JUDGE OF THE SUPERIOR COURT OF ARIZONA, PIMA COUNTY,	No. 2CA-SA 2019-0051 Pima County Superior Court No. C20174589 **<u>CORRECTED</u> CROSS-PETITION FOR SPECIAL ACTION**

Respondent Judge,

v.

BANNER UNIVERSITY MEDICAL CENTER TUCSON CAMPUS, LLC, an Arizona Corporation dba BANNER UNIVERSITY MEDICAL CENTER TUCSON; GEETHA GOPALAKRISHNAN, MD; MARIE L. OLSON, MD; EMILY NICOLE LAWSON, DO; DEMITRIO J. CAMARENA, MD; PRAKASH JOEL MATHEW, MD; JASON THOMAS ANDERSON, MD; SARAH MOHAMED DESOKY, MD; BANNER HEALTH; BANNER UNIVERSITY MEDICAL GROUP,

Defendants/Real Parties in Interest

This lawsuit turns on medical malpractice committed on October 23-24, 2015, at Banner University Medical Center, Tucson (BUMCT) resulting in the death of a 14-month-old boy, Connor Harris. This Petition seeks to prevent the application of the protections and advantages of A.R.S. §§ 12-821 and 821.01 in factual settings and producing effects that were never intended by the legislature. These statutes give governmental entities and government employees acting within the course and scope of government employment the right to require notice of potential litigation within six months of the occurrence of the conduct alleged to be negligent, and to require the filing of litigation within a year of those occurrences, rather than the usual two

years for medical malpractice litigation for lawsuits brought against non-governmental agencies.

The specific and *only* purposes of these statutes are to permit the government to evaluate potential lawsuits early in the course of litigation, when costs are still limited; to have the opportunity to settle those cases worthy of settlement early, perhaps even prior to filing; and, most important, to have early, accurate information to use when budgeting for potential future liability. This explicit and limited legislative intent is set forth without ambiguity in dozens of Supreme Court and appellate cases, cited below and in Cross-Petitioners' brief at the trial court level, in their motion that sought exclusion of the physicians' §§ 12-821 and 12-821.01 defenses.

There is no case law, statutory law, or legislative history supporting the proposition that the legislature intended any purpose for these statutes other than giving governmental entities or their employees (when acting within the scope of that government employment), a unique opportunity to mitigate the financial risks of medical malpractice liability. Further, there is no case law, statutory law, or legislative history supporting an assertion that government employees are entitled to the advantages of a six-month notice of claim requirement or a one-year statute of limitations for asserted negligence during employment by non-governmental corporations.

In this case, the trial court granted summary judgment to a group of physician defendants under to these two statutes. This ruling came in the face of undisputed evidence that the provisions of Banner Health's takeover of BUMCT and of the associated physician practices **(**subsumed into Banner University Medical Group ("BUMG")), extinguished *in its entirety* any potential malpractice liability for any government entity for clinical work done at BUMCT. This ruling came in the face of contractual provisions which gave Banner plenary control over all aspects of medical care at BUMCT and required Banner to provide all the facilities, equipment, and personnel needed to render patient care, meeting thereby every requirement under Arizona law to prove that the negligent acts at issue were performed within the scope of non-governmental employment. In this case, Banner admits it would be vicariously liable for the physicians' negligence, but for their procedural dismissal, indicating that they controlled, supervised, and employed the physicians.

Cross-Petitioners contend these summary judgments were granted in error.

Cross-Petitioners do NOT believe special action relief regarding the trial Court's determination that Banner remains vicariously liable for the physicians' acts and omissions after the physicians' dismissal is appropriate in this case, for the reasons stated in our Response to Banner's Petition for Special Action. However, if this Court grants jurisdiction on that issue, then justice requires that the Court also grant special action relief in order to review the trial court ruling that the Banner-

employed physicians are entitled to the protections of the Notice of Claim and shortened statute of limitations in the first place. For that reason only, Cross-Petitioners seek special action review of the trial court's June 12, 2019 ruling dismissing the physicians under §§12-821 and 12-821.01.

I. FACTS

Cross-Petitioners incorporate by reference here all the facts we stated in our Response to Banner's Petition for Special Action.

II. ISSUES PRESENTED

Do the protections of A.R.S. §§12-821 and 12-821.01 apply to immunize nongovernmental corporations from liability for malpractice committed by their employee physicians where the malpractice at issue was committed during the course and scope of the physicians' nongovernmental employment, simply because the physicians are contemporaneously faculty at the University of Arizona Medical School?

Do the protections of A.R.S. §§ 12-821 and 821.01 apply to immunize nongovernmental corporations from liability for medical malpractice committed by their employee physicians, who are also employees of the University of Arizona Medical School, Tucson, when the nongovernmental corporation has by contract extinguished in its entirety any and all potential liability for any governmental entity or government employee for the asserted negligent acts at issue?

III. REASONS WHY JURISDICTION SHOULD BE GRANTED

As stated above, special action relief on the issue of application of A.R.S. §§12-921 and 12-821.01 to the physicians in the first place, given the circumstances of the Banner takeover, is ONLY requested by Cross-Petitioners if this Court grants jurisdiction to review Judge Gordon's decision that the physicians' dismissal did not extinguish vicarious liability of the private Banner corporations for the physicians' acts or omissions. If the trial court's decision that vicarious liability in these corporations survives the physicians' dismissal is to be reviewed**,** then justice requires that the earlier decision to dismiss the individual physicians should also be reviewed. Banner's acquisition of the University assets and its comprehensive assumption of medical malpractice liability for care rendered at BUMCT extinguished any government liability for medical malpractice. The Harrises contend that this acquisition and this assumption of all potential liability also foreclosed any application of the government Notice of Claim requirement or of the shortened statute of limitations to medical malpractice claims based on conduct at what was formerly University Medical Center, but became, with the takeover, months before Connor Harris's death, Banner University Medical Center Tucson. But Judge Gordon's second ruling, that dismissal of the individual physicians did not extinguish vicarious liability claims against BUMG and Banner Health, gets us

to the same place: Banner will be held accountable for its negligence like all other private corporations.

The following are reasons why this Cross-Petition should be granted IF Banner's Petition is granted.

A. The issue raised is one of first impression.

Neither party has found case law relating to the specific limits of the ambit of A.R.S. §§12-821 and 12-821.01 in these circumstances; nor has the trial court. The issue is narrow and specific: whether or not these statutes were ever intended to apply where the particular application of the statute was unrelated to the reason the statute was passed, where it selectively advantages some non-governmental corporations and not others, and where applications brings about unforeseen, unintended and draconian results harming already-injured plaintiffs.

This appeal will determine whether these or any laws should be applied when their application cannot possibly implement their intended purpose, and where that application would confer unintended legal privileges nonuniformly, on selected tortfeasors.

B. This Issue is of State-wide Interest.

Though Banner is the specific non-governmental entity seeking the protection of a government-protective statute, the implications of the continued application of a law when such application cannot possibly carry out its intended purpose, i.e. the

literal application of a statute without relation to the facts on the ground, has ramifications that flow to other, and perhaps all regulatory statutes.

C. There Is No Complete Remedy For Petitioners Outside The Assumption Of Jurisdiction Of Our Appeal By The Appellate Court *Other Than* The Denial Of Defendant's Petition For Special Action Regarding Vicarious Liability.

If Banner's petition is denied, the trial set for April 2020 goes forward permitting the assertion of vicarious liability against Banner. The Harrises will have a remedy for what it considers was judicial error regarding potential mis-application of §§12-821 and 12-821.01 in the form of an appeal *after the trial* of that summary judgment given to the faculty physicians, in conformity with Rule 54(b), *if such appeal is even needed*. However, if Banner's petition is granted, the Harrises would, absent granting of their own petition, be forced to go to trial against only nurses and radiology techs at BUMCT, and against the pediatric, non-faculty surgeon (not a Banner employee), who, through his intern, not in person**,** came on the scene after Connor Harris had begun to deteriorate. Such a restriction would materially disadvantage a family which lost a child, eliminating from the litigation not only the physicians whose ignorance, indifference, lack of supervision and frank sloth caused Connor Harris's death, in the view of plaintiffs and their experts, but also their employer, even though that employer, not a government entity, would be the de facto beneficiary of a statute designed to protect only government entities.

In this setting, if Banner's petition is granted jurisdiction, the interest of justice and equity require that the Harris Petition also be granted jurisdiction and that the two appeals be considered concurrently. We do not believe that a statute designed to permit the government to protect its financial interests is applicable, unrelated to legislative intent, where the government has no financial exposure; and we do not believe that the legislature intended for private, nongovernmental medical corporations to de facto purchase a six month claims and one year filing statute of limitations simply by hiring University faculty, who are completely controlled in every aspect of their clinical work by the non-governmental corporation, to see the corporations' patients. Absent the granting of this Cross-Petition, granting Banner's petition for jurisdiction would put these parents in an extremely restricted legal position on the basis of as yet unexplicated law.

If the Banner Petition and the Harris Cross-Petition for special action are both denied, there is a significant probability that the "deferred" appeals will never come to pass. The prevailing party will have no need to appeal; and the losing party would have to weigh the benefits of appeal against the potential for having an appellate court side with the trial court, converting a trial court ruling that has no authority to bind other courts into one that carries precedential effect. Rule 54(b), if stringently enforced, thus has the power likely to save appellate courts and litigators a great deal of time, money and effort.

D. The Court's Decision To Apply A.R.S. §§12-821 And 12-821.01 In The Absence Of Any Government Financial Exposure Was In Error

1. The Total Absence Of Financial Exposure For Medical Care Rendered At BUMCT By Any State Entity Or Its Employees, Effectuated Through Banner's Assumption Of All Such Potential Liability, Makes §§12.821 and 12-821.01.01 Inapplicable In This Case

a. Legislative Intent Must Control How a Statute is Construed and Applied

The primary rule of statutory interpretation is to discern and apply the legislative purpose of the statute in question. This Court must apply statutes in a manner that furthers this legislative intent. *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383, ¶ 8, 296 P.3d 42, 46 (2013) holds as follows:

> The cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute" (*Phoenix Title & Trust Co v. Burns,* 96 Ariz. 332, 334, 395 P.2d 532, 533-4 (1964); *Payne v. Knox,* 94 Ariz. 380,381, 385 P.2d 514,515 (1963)). "In determining the Legislature's intent in enacting a statute, this Court will look to the policy behind the statute and the evil which it was designed to remedy" (*Cohen v. State,* 121 Ariz. 6, 9 588 P.2d 299, 302 (1978), *City of Mesa v. Salt River Project Agr. Imp. & Power District,* 92 Ariz.91, 105, 373 P2d. 722, 732 (1962). "Additionally, we will look to the words, contexts, subject matter and effects and consequences of the statute (*State ex re. Flournoy v. Mangum,* 113 Ariz. 151, 152, 548 P.2d 1148,1149 (1976)." *Calvert v. Farmers Insurance Company of Arizona,* 144 Ariz. 291, 294, 697 P.2d 684, 687(1985). *See also, Martin v. Martin,* 156 Ariz. 452, 457, 752 P.2d 1038,1043 (1988).

b. The Legislative Intent Behind A.R.S. §§12-821 And 12-821.01 Is Clear And Is Restricted To Financial Protection Of Government Entities.

Arizona case law unambiguously holds that the legislative intent of A.R.S. §§12-821 and 821.01 is to permit government entities to investigate the claim against it, assess its potential liability, reach an early settlement if appropriate, and budget and plan for potential future liability. There is no paucity of Arizona case law setting out the *reasons* for A.R.S. §§12-821 and 12-821.01, its "spirit," the "evils it was intended to prevent;" its exclusive application to *government* entities or employees acting within the scope of *governmen*t employment and the "absurd conclusions" that would result from either applying these statutes to shield non-governmental entities or its agents/employees from the same potential liability for tortious harm to which ordinary citizens and corporations are normally exposed, or where there is no potential financial liability to be protected.

The case law sets out not only the purposes of the law, but the intended limits of its application. At the Supreme Court level:

> *Backus v. State of Arizona,* 220 Ariz.101, 104, 203 P.3d 499 (2009):
>
> These statutory requirements serve several important functions: "They allow the *public entity* to investigate and assess liability…permit the possibility of settlement prior to litigation and…assist the *public entity* in financial planning and budgeting.' (*Deer Valley Unified Sch. Dist No. 97 v. Houser*, 214 Ariz. 293, 295-6,152 P.3d 490, 493 (2007). Our interpretation of the statute at issue, then, must be consistent with both the general intent of the claims statutes and the intent of the specific statute involved. (Emphasis added.)
>
> *Falcon v. Maricopa County*, 213 Ariz. 525, 527 ¶9, 144 P3d 1254, 1256 (2006):

> The notice of claim requirements in A.R.S. 12-821.01 serve "to allow the *public entity* to investigate and assess liability, to permit the possibility of settlement prior to litigation, and to assist the *public entity* in financial planning and budgeting. *Martineua v. Maricopa County,* 207 Ariz. 332, 335-6, 86 P.3d 912, 915-916 (App. 2004)" (Emphasis added.)

At the appellate level, space and word limitations prevent full recitation of identical holdings regarding the purposes of this statute and the view that the application of these statutes should be limited to effectuating these purposes. The undisputed policy statement asserted in appellate cases, mirroring that of the Arizona Supreme Court, is as follows:

> The purpose of the statute is to provide the governmental entity with an opportunity to investigate the claim, assess its potential liability, reach a settlement prior to litigation, budget and plan. (Emphasis added.) *Havasupai Tribe of the Havasupai Reservation v. Arizona Board of Regents,* 220 Ariz. 214, 223, 204 ¶28 P.3d 1063,1072 (App.2009).

Virtually identical holdings are set forth in *Pivotal Colorado II, L.L.C. v. Arizona Public Safety Retirement System, 234 Ariz. 369,370, ¶5,322 P.3d 186,187 (App.2014); Drew v. Prescott Unified School Dist.* 233 Ariz.522, 524 ¶9, 314 P.3d 1277, 1279 (App.2013); *Vasquez v. State* 220 Ariz. 304, 308 ¶9, 206 P.3d 753,757 (App.2008); *Yollin v. City of Glendale* 219 Ariz. 24 27-28,¶*7* 191 P.3d 1040, 1043-44 *(App.2008), Lee v. State* 215 Ariz. 540, 543¶9 161 P.3d 583,586 (App.2007)*; Harris v. Cochise Health Systems* 215 Ariz. 344, 351 ¶25,160 P3d 223,230 (App.2007); *Barth v. Cochise County, Arizona* 213 Ariz. 59, 62 ¶9, 138 P.3d 1186,1189 (App.2006)*; City of Tucson v. Fleischman,* 152 Ariz. 269, 272, 731 P.2d 634, 637 (App. 1986); *Mammo v. State* 138 Ariz. 528, 531 ¶5,675 P2d 1347, 1350

(App. 1984); and *State v. Brooks* 23 Ariz. App. 463, 466,534 P.2d 271 (App.1975). The court in *Brooks* noted that the statute existed "to establish an orderly procedure by which the legislature would be advised of claims in instances where no provision had been made for payment."

c. Since this lawsuit created no governmental exposure to financial liability, analysis of legislative intent requires the Court to recognize that A.R.S. §§12-821 and 12-821.01 do not apply

As of July 1, 2015, three months before Connor Harris's death, as the declarations and the affiliation agreements in exhibits set out below, and as the deposition of the Chief Risk Manager of the University of Arizona, Steven Holland show, the exposure of the University of Arizona, the Arizona Board of Regents (ABOR), or any other governmental entity to malpractice liability issuing out of clinical care rendered by faculty members at BUMCT became, and remains: zero (Harris App. 6[1], ¶¶5, 8-9). Mr. Holland knew of no payment by any State entity for claims related to clinical care rendered at BUMCT after July 1, 2015, or any reason for the State to set aside any funds in prospect of liability; nor did any governmental entity maintain any "self-insured" retention funds for prospective liability. (Harris App. 6, ¶16) As of July 1, 2015, all prior "cost or risk" allocation agreements between ABOR and outside nongovernmental entities, like UPI/UPH, some form or

[1] Respondents Harris have today filed an Appendix that supports both the Harris Response to Banner's Petition and the Harris Cross-Petition. For clarity's sake, we will refer to the parties' appendices as either "Banner App." or "Harris App."

which had existed since 1996, ended, *with no replacement* (Harris App. 6, ¶12) University or ABOR committee activity regarding the analysis or defense of claims against government entities or their employees for clinical work at BUMCT ceased (Harris App. 6, ¶14) All faculty members were informed that their malpractice coverage "**only for clinical care rendered**" would be provided fully and only by Banner. (Harris App. 6, ¶17-18)

Finally, and dispositively as regards the absence of any governmental financial exposure, BUMG responded to Requests for Admission by admitting 1) that no Arizona governmental entity has any financial exposure to liability in this lawsuit, and 2) that all malpractice insurance cited in defendant's disclosure statements was paid for in full by Banner with no allocation agreement to divide responsibility for liability covered by this policy with any State entity. (Harris App. 11)

All of the named physicians rendered clinical care to Connor Harris with zero risk of liability to themselves or to any government entity because the Affiliation Agreement, §1.19, holds the University harmless for malpractice relating even to negligent Supervision of medical trainees and in §§5.1. 1.19,11.21 and 1.2.1 for malpractice committed by these trainees. (Harris App. 6, ¶9).

Given the absence of actual or even potential liability assessable against any government entity for the negligent clinical care rendered to Connor Harris,

application of A.R.S §§ 12-821 or 12-821.01 to bar any portion of this lawsuit would not only apply these statutes in the absence of their intended purpose but would apply them to bring about protections against liability that no legislature ever intended a private non-governmental entity to have. Cross-Petitioners respectfully assert that this would be the type of "absurd result" that case law teaches us that the application of the accepted principles of statutory interpretation is meant to avoid.

d. <u>During The Rendering Of Clinical Care At BUMCT, The Named Faculty And Resident Physician Defendants Were Employees Of Banner Acting Within the Scope of Banner Employment. Clinical Care was Defined by the Affiliation Agreement as coming under the exclusive control of Banner. A.R.S. §§12-821 And 12-821.01 Do Not Apply To Employees Of A Non-Public Entity.</u>

To correctly determine whether A.R.S. §§12-821 and 12-821.01 applied to plaintiffs' claims against the defendants in this case, the court was required to find, as is required in any summary judgment motion, that defendants had carried *their burden of proof,* in this instance to show that when the physician defendants were caring for Connor Harris, they were acting as public employees, within the scope of their employment by the State of Arizona when their asserted negligent actions occurred. *National Bank of Arizona v. Thruston*, 218 Ariz. 112, ¶12, ,180 P.3d 977 (App. 2008). The Banner defendants also had the burden of proving that they were entitled to the benefits of A.R.S. §§12-821 and 12-821.01. Application of the statute of limitations is an affirmative defense and therefore, the defendants here have the burden of showing that §12-821 applies to these claims. *Dube v. Desai*, 218 Ariz.

362, 366, ¶12, 186 P .3d 5 87, 591 (App. 2008). As for the special government provisions of the Notice of Claim Statute, A.R.S. § 12-821.01, since the defendants claim the benefit of this statute, the defendants again carry the burden of proving that the statute applies to them. *See e.g*., *Aranda v. Cardenas*, 215 Ariz. 210, 216, ¶20, 1509 P.2d 76, 82 (App. 2007), *Harvest v. Craig*, 195 Ariz. 521, 524, ¶15, 990 P.2d 1080, 1083 (App. 1999).

Public employment in general is not sufficient. The tortious acts must have occurred within the course and scope of that public employment. The Supreme Court, in *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383, ¶ 8, 296 P.3d 42, 46 (2013), held:

> In *McCloud v. State*, 217 Ariz. 82, ¶ 25, 170 P.3d 691, 699 (App.2007), we noted that § 12–821.01 has consistently been applied only to claims arising out of acts by public employees in the scope of their employment. *Dube v. Desai*, 218 Ariz. 362, 365, ¶ 11-12, 186 P.3d 587, 590 (App. 2008) This Court must apply statutes in a manner that furthers this legislative intent.

Interpreting §§12-821 and 12-821.01 "to apply to claims against a public employee who was not acting in the scope of his or her employment at the time of the actionable event would be contrary to the legislature's intent and inconsistent with the interpretation of related statutes." *McCloud v. State, Ariz. Dept. of Pub. Safety*, 217 Ariz. 82, 90, ¶ 22, 170 P.3d 691, 699 (App. 2007)

In their Motion to Dismiss below, defendants argued nothing more than that at the time of the malpractice, the defendant physicians had employment contracts

with the University of Arizona and were employees of the State through the University. These employment agreements are pertinent to our controversy, however, *only* if the defendants were acting within the scope of that University employment when they committed the asserted torts. This is the central question regarding the application of §§12-821 and 12-821.01: within the ambit of *whose* employment were the defendants acting when they rendered clinical care that permitted Connor Harris to die from a surgically remediable condition?

Significantly, however, to the extent that any of the physician defendants had contracts with the University, at the same time, they had dual employment with BUMG and Banner Health. This was demonstrated in the letters sent to University employees setting out the complete assumption of all potential liability for malpractice by Banner and the provisions of the Affiliation Agreements, setting out the control by BUMG of hours, shifts, ability to work, method of practice, imposition of discipline and provision of ubiquitous indices of Banner employment and control. (Harris App. 6 Ex. 13)

Mere employment by the State does not confer the benefits of §§12-821 and 12-821.01. It does so only if the tortious conduct at issue comes within the scope of that employment, i.e. if those torts were committed while the named physicians, in giving clinical care, were under the control of, and using the instrumentalities and personnel of the University rather than under the control of and using the

instrumentalities and personnel of Banner. In *McCloud*, the court found that the trial court incorrectly dismissed the case under §12-821, based on the inconclusive evidence that DPS Officer Kimbro was employed by the state. "That Kimbro was on his lunch break does not resolve the question whether he was acting in the scope of his employment." *McCloud* 217 Ariz. at 91, ¶ 30, 170 P.3d at 700. Clearly, DPS Officer Kimbro could have committed any number of acts while off-duty, even when he was an employee of the state. These just would not have been in the scope of his employment with the state." In McCloud, as in this case, the defendant failed to meet its burden of proof. In that case, even ambiguity of function precluded the application of the statutes at issue. In our case, there is no uncertainty about the degree of Banner employment and control when the tortious acts and omissions occurred.

A logical question is: why would this private corporation assume 100% liability for medical malpractice if it did not have 100% control over how the medical care was to be provided?

Indeed, given the common understanding of Banner's size and business sophistication and the complete assumption of all potential liability for Medical Malpractice committed by physicians at BUMCT through its captive Insurer (App. 5 Ex.10), it would, we submit, require a profoundly counterintuitive leap of faith to conclude that Banner did not keep a prohibitively tight rein on all aspects of the

practice of Medicine at its wholly owned facility, consistent with Arizona definitions of employment.

They would not and did not cede any control over any index of employment of physicians caring for patients at BUMCT to the University, as all the evidence below showed. There was never any admissible evidence offered by the Banner parties that showed the University had any control whatsoever over the provision of clinical care at the hospital. In fact, it was obvious that the point of the business deal was to get the University out of the business of providing hospital care and let an established health care provider (Banner) take over.

The basis of the trial judge's ruling was that no reasonable juror could find that providing clinical care was outside the scope of the physician's employment with the University. (Banner App. Ex. B, p. 2) Yet the record evidence established that the intent of both the University and the Banner corporations in drafting the acquisition contracts was that BUMG and only BUMG would provide clinical care. To the extent that BUMG used any physicians employed by the University to provide that care, Banner *paid the University for the physicians' time!* (Harris App. 6, ¶26)

Further, the trial court applied A.R.S. §§12-821 and 12-821.01 to the defendants despite evidence of absence of any government exposure because it had determined that "this was the law." The court stated:

> The court rejects the argument that it can construe A.R.S. §12-821.01 as not applying because even if the uncontested record shows that the State would not suffer financially from an adverse judgment, the Court believes that that is outside its scope of interpretation and would be a transgression of separation of powers to construe the statute as not applying.

(Banner App. B) In other words, the trial court made the determination that, despite reference to an "uncontested record" showing no State exposure, that it could not decline to apply these statutes where there was evidence of *any* State employment because it felt that addressing the issue of application in the setting of dual employment and absent government exposure was a matter that only the legislature or appellate courts had the authority to decide. The trial court's error was in fixating on *any* evidence of State employment, rather than the correct standard: whose scope of employment applied, as required by *McCloud*.

Banner impliedly asserted a novel legal theory: if a defendant is *accompanied by a resident* when he commits a tortious act on a Banner patient in *the exclusive course of his Banner employment*, that tortious conduct somehow changes so as to come within the ambit of A.R.S. §§12-821 and 12-821.01. This "protection from liability by having the right companion" theory is not, we respectfully assert, an established or convincing "principle of statutory or general tort analysis."

Aside from all the evidence in this case that it was the University's and Banner's intent that Banner govern clinical care, A.R.S. §23-613.01(a) more generally defines "employee" as follows, in a manner that, applied to our case,

makes the defendant physicians Banner employees at the time their care brought about Connor Harris's death:

> "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule, or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Indications of control by the employing unit include controlling the individual's work hours, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers.

As noted in the cited documents, as of October 23-24, 2015, the dates of Connor's care at BUMCT, every element of the definition of "employee" was present as regards Banner employment of the named physicians when rendering patient care at BUMCT.

The issue is, at root, therefore, straightforward: whether the tortious acts were committed as part of conduct under the control and authority of Banner, or whether they were part of conduct under the control and authority of the University. *This lawsuit does not assert malpractice in the course of teaching or research*, the sole areas over which, pursuant to the Affiliation Agreements, the University had control sufficient to support the assertion of employment. It asserts malpractice in the area of endeavor over which Banner had absolute and plenary control: the rendition of clinical care at BUMCT. If all postulated elements of teaching are eliminated from our fact pattern, leaving behind only the issue of clinical care, the malpractice, harm

and this lawsuit would remain unchanged. But if the clinical care is eliminated, leaving behind only the teaching of residents, there would be no lawsuit.

On February 28, 2015, the University of Arizona transferred responsibility for every aspect of the provision of clinical care at BUMCT to Banner. As discovery has shown, the University had *no authority with regard to any aspect of clinical care at the hospital by any physician*. The University relinquished all such authority to Banner.

All evidence considered, the physicians caring for Connor Harris could only have been acting within the scope of their agency with Banner, not the University; and no governmental entity or employee had any potential liability falling within the ambit of A.R.S. section 12-821 and 12-821.01 to protect.

Finally, the contention that non-governmental health care providers, like Banner Health, may capture the shortened statutes of limitations of A.R.S. §§12-821 and 12-821.01.01 simply by hiring University faculty to do their corporate work [App.5], while those physicians remain under the complete control of the non-governmental employer, finds no home in any corner of Arizona law. Such statutory construction would create two sets of non-governmental health care providers, those subject to a six-month notice of claim and one-year statute of limitations for filing on the one hand, and those subject to a two-year statute of limitations on the other. No such result was intended by the legislature

IV. CONCLUSION

For the foregoing reasons, if this Court accepts jurisdiction of Banner's Petition, Cross-Petitioners Harris respectfully request that the court grant jurisdiction on their claim of reversible judicial error regarding the application of A.R.S. §§ 12-821 and 12-821.01 to physicians for whom the State's financial exposure for malpractice was nil and whose tortious acts occurred during the course of non-governmental employment.

RESPECTFULLY SUBMITTD this 19th day of November, 2019.

LAW OFFICE OF JOJENE MILLS, P.C.

By: /s/ JoJene Mills

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached Petition for Special Action uses type of at least 14 points, is double-spaced, and contains 5,111 words. The Petition does not exceed the word limit set by Rule 7(e), R.P.S.A.

/s/ JoJene Mills

CERTIFICATE OF SERVICE

JoJene Mills, being first duly sworn, upon oath states that on the 19th day of November, 2019, she caused the original of the foregoing Cross Petition for Special Action to be electronically filed with the Arizona Court of Appeals Division Two website and sent via e-mailing and mailing, via First Class Mail to:

Honorable Richard E. Gordon
Judge of the Superior Court Pima
County Superior Court
110 W. Congress Street
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Respondent Judge

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